

SERVED : April 26, 1993

NTSB Order No. EA-3861

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of April, 1993

JOSEPH M. DEL BALZO,
Acting Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-11134

v.

N. JUDGE KING,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, rendered at the conclusion of an evidentiary hearing on March 26, 1991.* At that time, the law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for a violation of

¹An excerpt from the hearing transcript containing the initial decision is attached.

section 91.10 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91).²

The law judge's decision is sufficiently detailed -that a complete exposition of the facts is unnecessary here. Briefly, the Administrator alleged that respondent, when taxiing his aircraft toward the hangar, failed to stop even though a Mr. Arneson stood in front of the aircraft and motioned, using appropriate hand signals, for respondent to stop. It is alleged that not only did respondent fail to stop, but he taxied dangerously close to Mr. Arneson. The law judge agreed that respondent violated section 91.10 and, therefore, affirmed the Administrator's order.

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order in its entirety for reasons discussed below.

In his appeal, respondent argues that the law judge's decision is inconsistent with the facts adduced at the hearing and does not sufficiently set forth the basis for her findings. To support his claim, respondent asserts that three witnesses

²§ 91.10 Careless or reckless operation other than for the purpose of air navigation.

No person may operate an aircraft other than for the purpose of air navigation, on any part of the surface of an airport used by aircraft for air commerce (including areas used by those aircraft for receiving or discharging persons or cargo) , in a careless or reckless manner so as to endanger the life or property of another.

(including respondent) directly contradicted the Administrator's primary witness, Mr. Arneson, and that this indicated the law judge, without a specific explanation of why she believed one witness over the others, was not justified in her decision.

We have read the law judge's decision and fail to see where it is lacking in explanation. The case was a fairly simple one, since respondent admitted that he taxied the aircraft and he saw Mr. Arneson signaling him to stop. Respondent claims that he stopped, had a conversation with Mr. Arneson from the aircraft's window (with both engines still running) , and then motioned for Mr. Arneson to move out of the way. By contrast, Mr. Arneson testified that respondent slowed but did not stop. He also stated that the aircraft moved towards him until he was about an arm's length from the propeller. As the aircraft went by, he had to duck under the wing to avoid being struck.

In her decision, the law judge explained that she did not believe a coherent conversation could have taken place, given the noise generated by the aircraft. After listening to all the testimony, she believed that respondent taxied the aircraft dangerously close to Mr. Arneson. It is apparent that she found the version of events testified to by the complaining witness more credible than that of the respondent.³ This decision is

³Regarding a law judge's credibility choices, we have stated that they "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations . . . were put forth . . ." Administrator v. Klock, NTSB Order No. EA-3045 at 4 (1989). See also Administrator v. King, NTSB Order No. EA-3459 (1991).

based on a preponderance of the-reliable, probative, and substantial evidence. The law judge, as the trier of fact, was in the best position to assess the demeanor of the witnesses as they testified. Absent a finding that her decision is arbitrary or capricious, it will not be disturbed. Administrator v. Pullaro, NTSB Order No. EA-3495 at 3 (1992), and cases cited therein.

Finally, citing Essery v. NTSB, 857 F.2d 1286 (9th Cir. 1988) , respondent argues that the decision of the law judge is inconsistent with Board precedent. He contends that to prove his conduct was careless, the Administrator was required to show either the likelihood of potential harm was unacceptably high or respondent's judgment as pilot-in-command was clearly deficient. The court in Essery, however, interpreted the standard as set forth in Administrator v. Reynolds, 4 NTSB 240 (1982), a case involving a helicopter, not a fixed-wing aircraft.⁴

The Board has stated, in the context of fixed-wing aircraft, that when the Administrator seeks to prove an airman violated FAR section 91.10, the potential for damage that could have resulted from the careless act must not be so remote as to be negligible. Administrator v. Jackson, EA-2970 at 6 (1989).⁵ Clearly the

⁴Essery concerned two separate incidents involving the same airman. In one instance he was piloting a helicopter; in the other, a fixed-wing aircraft.

⁵See also Administrator v. Winfree, 3 NTSB 2278 (1980), where the respondent was found to have violated section 91.10 by striking a fuel pump while taxiing even though he caused only minor damage. We found that "[r]egardless of the degree of lack
(continued. ...)

hazard created in-the instant case was not remote. By taxiing the aircraft so close to Mr. Arneson, respondent carelessly placed him in danger.

'ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 60-day suspension of respondents commercial pilot certificate shall begin 30 days after service of this order.^b.

VOGT, Chairman, COUGHLIN, Vice Chairman; LAUBER; HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁵(... continued)
of care, "... the collision . . . was inescapably the result of careless operation." Id. at 2279.

⁶For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).